

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDERICK TUCKER,

Defendant-Appellant.

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UNPUBLISHED

September 16, 2003

No. 239969

Oakland Circuit Court

LC No. 1999-169374-FH

Before: Owens, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver between 50 and 225 grams of cocaine, MCL 333.7401(2)(a)(iii), felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant argues that he was denied a fair trial because the jury was not instructed that the prosecution had to prove that defendant knew the amount of cocaine in order to convict him on the charge of possession with intent to deliver between 50 and 225 grams of cocaine. We disagree. In *People v Marion*, 250 Mich App 446; 647 NW2d 521 (2002), this Court considered and rejected the argument that “the prosecutor had to prove defendant’s knowledge of the amount of the mixture as an element of the offense pursuant to *People v Mass*, 464 Mich 615; 628 NW2d 540 (2001).” *Id.* at 447. After review of relevant case law, the *Marion* Court held that “knowledge of quantity is not an element of possession with intent to deliver.” *Marion, supra* at 448-451. We agree with and are bound by this decision. See MCR 7.215(I)(1).

Next, defendant argues that the trial court improperly admitted into evidence, under MRE 404(b), the crack cocaine that was confiscated from the basement of the home because defendant was not charged with possession of that cocaine. We disagree. We review a trial court’s rulings on the admission of evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

A conviction for possession with intent to deliver between 50 and 225 grams of cocaine, requires that the prosecution prove that (1) the recovered substance was cocaine, (2) the cocaine was in a mixture weighing between 50 and 225 grams, (3) the defendant was not authorized to possess the cocaine, and (4) the defendant knowingly possessed the cocaine with the intent to deliver it. See *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748, amended 441 Mich 1201 (1992). The “intent to deliver” element can be established by circumstantial evidence and reasonable inferences arising from that evidence. See *Wolfe, supra* at 524, 526. Here, contrary to defendant’s argument, the crack cocaine was not admitted as evidence of other bad acts; rather, it was admitted as evidence of defendant’s intent to deliver the cocaine that he possessed—likely as crack cocaine.

The testimony at trial revealed that crack cocaine is made by mixing powder cocaine (which defendant was charged with possessing), with a cutting agent like baking soda (which was found in a refrigerator in the house), in a glass jar (which was also found in the basement and contained cocaine residue). The testimony also indicated that crack cocaine is typically individually packaged for sale purposes, just as the crack cocaine that was found in the basement of the house in which defendant lived. Accordingly, the crack cocaine that was confiscated along with the other evidence was presented to the jury merely as evidence of defendant’s intent to deliver. The crack cocaine was not attributed to defendant and he was not charged with possessing it. Therefore, the trial court did not abuse its discretion in admitting this evidence.

Next, defendant claims that the prosecutorial misconduct denied him a fair trial. We disagree. This Court reviews claims of prosecutor misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

First, we reject defendant’s claim that the prosecutor impermissibly argued that the powder cocaine found in defendant’s bedroom was used to make the crack cocaine found in the basement. As the trial court held, the prosecutor simply argued that powder cocaine is used to manufacture crack cocaine. Second, we reject defendant’s claim that the prosecutor impermissibly argued “that the cocaine found in the basement was much larger than the small bags found in the streets of Pontiac.” Rather, in his closing argument the prosecutor was merely explaining that “intent to deliver” can be inferred from the large amount of cocaine that defendant possessed which was inconsistent with personal consumption. A prosecutor is free to argue the evidence and all reasonable inferences arising from the evidence as they relate to his theory of the case. *Bahoda, supra* at 282. Accordingly, defendant has failed to establish grounds for a new trial.

Finally, defendant argues that “the trial court was correct and the court of appeals was incorrect in interpreting the felon in possession of a firearm statute’s [sic] pretrial.” Defendant sets forth no argument in support of his position. Apparently defendant is referring to the fact that the trial court had quashed the felon in possession count and one felony firearm count and that such decision was subsequently reversed by our Supreme Court following the prosecution’s

application for leave to appeal. The Supreme Court's decision constitutes the law of the case to which we are bound. See *People v Herrera (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543 (1994).

Affirmed.

/s/ Donald S. Owens  
/s/ Mark J. Cavanagh  
/s/ Patrick M. Meter